IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

ELECTRO METALLURGICAL SALES CORPORATION, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on February 9, 1956, reversing, with directions, the judgment of the United States District Court for the District of Colorado, entered June 17, 1955, as to petitioner Electro Metallurgical Sales Corporation.

OPINIONS BELOW

The opinion of the district court filed on June 17, 1955, reported in 132 F. Supp. 388, and of the court below filed on February 9, 1956, not yet reported, are for convenience

appended to this petition, marked Appendix A and B, respectively.

JURISDICTION

The date of the judgment sought to be reviewed and the date of its entry are February 9, 1956.

Application for extension of time to file petition for writ of certiorari was filed March 8, 1956, and order granting extension of time to and including April 11, 1956, was entered March 12, 1956.

The jurisdiction of this Court to review the judgment in question by writ of certiorari is invoked under the United States Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The question presented is whether a criminal prosecution under the Sherman Act, brought against a New York corporation subsequently dissolved and merged, abates as in the case of a deceased individual, or whether the corporation remains in existence under New York law or otherwise so as to permit the prosecution to continue.

STATUTES INVOLVED

Stock Corporation Law, Art. 8, Ch. 59, Sec. 85.1, 2, and Sec. 90, Consolidated Laws of New York (Laws of 1923, Ch. 787, amending generally Laws of 1909, Ch. 61); and General Corporation Law, Art. 2, Ch. 23, Sec. 29, Consolidated Laws of New York (Laws of 1929, Ch. 650), Appendix C.

STATEMENT OF CASE

This is a two-count criminal information filed September 21, 1948, in the United States District Court for the District of Colorado against Union Carbide and Carbon Corporation, three subsidiaries thereof, and Vanadium Corporation of America. Petitioner was one of the three defendant subsidiaries aforesaid.

The information charges these defendants in Count I with conspiracy to monopolize interstate and foreign trade and commerce in ferro-vanadium and vanadium oxide in violation of Section 2 of the Sherman Act, and in Count II with conspiring to fix prices for the sale of ferro-vanadium and vanadium oxide and for the purchase of vanadium-bearing ore, in violation of Section 1 of the Sherman Act (R. 3-11).

On January 7, 1954, a motion was filed to dismiss the information as to the three co-defendant subsidiaries of Union Carbide and Carbon Corporation, on the ground that subsequent to the filing of this information and the entry of "Not Guilty" pleas thereto by all defendants, the three subsidiaries had been dissolved and merged into Union Carbide and Carbon Corporation. Defendant Electro Metallurgical Company was dissolved on December 31, 1948, pursuant to the laws of West Virginia, its state of incorporation; United States Vanadium Corporation and Electro Metallurgical Sales Corporation were merged into Union Carbide and Carbon Corporation on December 30, 1950 and February 28, 1949, respectively, pursuant to the laws of their states of incorporation, Delaware and New York (R. 11), and their existence terminated.

The District Court sustained the motion and on June 17, 1955 dismissed as to petitioner and the other two subsidiaries. It held that merger or dissolution terminated the existence of the corporations in each of the states; that the criminal prosecution therefore abated unless preserved by state statute; and that it was not preserved by the laws of any of the states of incorporation of the subsidiaries (R. 16-19).

The Court of Appeals on February 9, 1956 affirmed the dismissal as to two of the subsidiaries, United States Vanadium Corporation and Electro Metallurgical Company. The United States has indicated its intention to apply for a writ of certiorari as to that ruling and the record

has been forwarded by the Clerk of the Court of Appeals to the Solicitor General for filing in this Court.

The Court of Appeals on the same date reversed the District Court's dismissal as to petitioner, Electro Metallurgical Sales Corporation, a New York corporation. It held that under New York law the life of the corporation was preserved for this prosecution.

BASIS OF FEDERAL JURISDICTION IN DISTRICT COURT

Federal jurisdiction in the United States District Court rested on United States Code, Title 18, Section 3231, and on the Sherman Act, United States Code, Title 15, Sections 1 and 2.

REASONS FOR ALLOWANCE OF WRIT

The government has requested, or is about to request, a writ of certiorari as to that part of the judgment of the Court of Appeals which *affirmed* the dismissal as to petitioner's co-subsidiaries, a West Virginia corporation and a Delaware corporation. The same basic question in reverse is involved in petitioner's case, plus a conflict with the applicable law of New York. Even if the Court should not deem this of sufficient importance to warrant certiorari independent of the government's application, we submit that if certiorari is granted on the government's petition as to the West Virginia and Delaware corporations, the Court should review the entire case and correct the plain error of the Court of Appeals in its interpretation of the law of New York, on which it based its reversal in petitioner's case.

This Court has held that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist and that the result of the dissolution cannot be distinguished from the death of a natural person in its effect. *Oklahoma Natural Gas Co. v. State of Oklahoma,* 273 U.S. 257, 47 S.Ct. 391, 71 L.Ed. 634.

In *Chicago T. & T. Co. v. Forty-one Thirty-six Wilcox Bldg. Corp.*, 302 U.S. 120, 58 S.Ct. 125, 82 L.Ed. 147, the Court held that a private corporation in this country could only exist under the express law of the state by which it was created, that its dissolution put an end to its existence as in the case of a natural person, and that there must be some statutory authority for the prolongation of its life, even for litigation purposes. The Court further held that the state could either extinguish a corporation absolutely or continue its existence for specified purposes only, and that the federal government was without power to add to or take away from the qualifications to extinction provided by state law.

The error of the court below in construing the New York law as preserving the life of the merged subsidiary arose out of two misconceptions:

1. It applied the consolidation statute to a merger, in effect adding to the merger statute language that does not appear therein.

2. It misinterpreted this language which was taken from the consolidation statute.

Corporate merger is governed in New York by Section 85 of the New York Stock Corporation Law. It was under that section that petitioner was merged into Union Carbide and Carbon Corporation.

The merger statute is primarly aimed at the case of a wholly-owned subsidiary. In a merger the surviving possessor corporation into which the subsidiary has been merged continues to exist, while the subsidiary is dissolved.

Section 85.1 of the New York Stock Corporation Law provides:

> " • • • Upon the filing of such certificate," (of merger) "all of the estate, property, rights, privileges and franchises of such other corporation, shall vest in and be held and enjoyed by such possessor corpora-

tion * * * *but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof.* * * * " (Emphasis supplied)

Section 85.2 provides:

"The possessor corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations."

That the intent of this merger statute was to preserve civil liabilities and obligations only, seems self-evident. One corporation cannot assume the criminal guilt of another.

Consolidation is provided for by Section 90 of the New York Stock Corporation Law and requires different procedure and brings different results. Since the language of the consolidation statute was relied on by the court below, we will briefly consider it.

Upon consolidation of several corporations, a new corporation comes into existence, while the old are dissolved.

Section 90 is entitled, "Rights of Creditors of Consolidated Corporations." It provides that the rights of creditors shall not be impaired by the consolidation nor shall any liability or obligation existing against the corporation or any stockholder be released or impaired,

" * * *; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated, in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. * * * *and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party or in which any stockholder is a party shall abate or be discontinued*

by reason of such consolidation, but may be prosecuted to final judgment as though no consolidation had been entered into; *or such consolidated corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.*" (Emphasis supplied)

It is significant that the language of the consolidation statute that "no action or proceeding then pending • • • shall abate • • •," does not appear in the merger statute, but instead thereof the merger statute requires the possessor corporation to assume the liabilities and obligations of the merged corporation.

Both laws are clearly designed to protect corporate creditors and to permit the protection and preservation of the corporate assets. In pending suits they permit the substitution of the new or continuing corporation for the merged and dissolved corporations. Criminal prosecution is neither mentioned nor considered.

The Court of Appeals relied on the opinion of Judge Weinfeld in the case of *United States of America v. Cigarette Merchandisers Association, Inc. et al,* 136 F.Supp. 214, in his interpretation of Section 90 of the New York Stock Corporation Law. The Court of Appeals in discussing that case recognizes the distinction between merger and consolidation in New York, but concludes that because the consolidation statute preserves "actions," though the merger statute does not, the state's public policy in both must be deemed to be governed by the former. We submit that the inclusion in one and the exclusion in the other is convincing of the legislative intent to the contrary.

The *Cigarette* decision, supra, rests primarily on the General Construction Law of New York (Art. 2 and 7, Ch. 22, Consolidated Laws of New York (Laws of 1909, Ch. 27)), which provides that it "shall apply to every statute unless its general object or the context of the language construed or other provisions of the law indicate that a

different meaning or application was intended from that required to be given by this statute." (Art. 7, Ch. 22, Sec. 110)

Art 2, Ch. 22, Sec. 11-a defines "action" as including a prosecution for the "punishment of a public offense," stating that, "actions are of two kinds, civil and criminal." Art. 2, Ch. 22, Sec. 18-a defines a "criminal action" as follows: "A 'criminal action' is prosecuted in the name of the people of the State of New York, as plaintiffs, against a party charged with crime."

If we are correct in our contention that the context, object and general language of Section 90 clearly point to the preservation of civil liabilities only, then the General Construction Law definition of "action" as including criminal prosecutions would under Section 110 of that Act be inapplicable.

If it should be deemed applicable, the definition still would not apply to this case, because the construction statute specifically limits criminal actions to those prosecuted by the State of New York, and so by implication eliminates federal prosecution.

On both of these points the Tenth Circuit Court itself has decisively spoken in the case of *United States v. Safeway Stores, Inc.*, 140 F. 2d 834 (10th Cir. 1944). In that case, Delaware, Nevada, California and Texas corporations were merged into a parent corporation, and as to each the Court held the corporations nonexistent for antitrust prosecution.

In a careful analysis of the statutes of each state, it holds that their language, almost identical with that of New York, refers to civil proceedings, not to criminal prosecutions.

As to the Texas statute, which specifically preserves state criminal prosecutions, the Court says, at p. 839:

"The Texas statute empowers the directors to maintain or defend judicial proceedings. It does include actions for a fine, forfeiture, or penalty that the State of Texas has, or may have, against the dissolved corporation. *But fines, forfeitures, or penalties due other sovereignties are necessarily excluded.*" (Emphasis supplied)

The Court's position on that point is sustained by *United States v. Leche et al,* 44 F.Supp. 765, 766, 767 (E.D.La.), and by *Ex parte Schreiber et al,* 110 U.S. 76, 3 S.Ct. 423, 28 L.Ed. 65.

As to the word "suit," which also appears in the New York statutes, *Safeway* says, at p. 838, after citing many authorities from various states and the United States Supreme Court: "It is therefore apparent under the decisions that the word 'suit' as used in the Delaware and Nevada statutes does not embrace a criminal prosecution."

As to the term "action," which is used in the California statute, *Safeway* says, at pp. 838, 839:

"The California statute, it will be observed, uses the phrase, 'prosecuting and defending actions by or against it.' Many of our courts have been called upon to define the word 'action', and from a review of those authorities, the term is held to mean civil actions and does not embrace criminal prosecutions.

* * *

"It is apparent that the California statutes do not include criminal prosecutions but rather * * * indicate that the provision has reference to winding up the affairs of the corporation, payment of its debts, and the distribution of its assets, and not to criminal proceedings."

The Court sustains its position in *Safeway* with the citation of a wealth of authority.

Safeway is relied on in *United States v. Line Material Co.*, 202 F.2d 929 (6th Cir. 1954), and criticized in *United States v. P. F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953).

The catchall provision of the General Corporation Law of New York, Art. 2, Ch. 23, Sec. 29, Consolidated Laws of New York (Laws of 1929, Ch. 650), Appendix C, speaks decisively of the preservation of civil obligations only.

We respectfully submit that the court below erred in its interpretation of the New York law and in reversing the district court as to petitioner.

CONCLUSION

For these reasons it is respectfully submitted that this petition should be granted.

Respectfully submitted,
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Attorneys for Petitioner.

April, 1956.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Criminal Action No. 11678

UNITED STATES OF AMERICA,
Plaintiff,

vs.

UNION CARBIDE AND CARBON CORPORATION, ET AL.,
Defendants.

Honorable Stanley N. Barnes, Assistant Attorney General, Worth Rowley, Special Assistant to the Attorney General, Charles L. Whittinghill, Esquire, Raymond M. Carlson, Esquire, and John P. Kelly, Esquire, 470 Post Office Building, Denver, Colorado, for Plaintiff; Messrs. Grant, Ellis, Shafroth and Toll, Attorneys at Law, Equitable Building, Denver, Colorado, for Defendants.

MEMORANDUM OPINION AND ORDER

KNOUS, Chief Judge.

A criminal information was filed September 2, 1948, by the United States of America, charging Union Carbide and Carbon Corporation, and three subsidiary corporations, Electro Metallurgical Company, United States Vanadium Corporation and Electro Metallurgical Sales Corporation, with violations of Sections 1 and 2 of the Sherman Act, Title 15, U.S.C.A., in conspiring to fix prices and to monopolize sales of ferro-vanadium and vanadium oxide. All defendants entered pleas thereto of not guilty on September 21, 1948.

Subsequently, Electro Metallurgical Company was dissolved on December 31, 1949, pursuant to the laws of West Virginia. Electro Metallurgical Sales Corporation, a New

York corporation, and United States Vanadium Corporation, a Delaware corporation, were merged with defendant Union Carbide and Carbon Corporation pursuant to the laws of the state of their incorporation on February 28, 1949, and December 30, 1950, respectively. It is stated by affidavit of Mr. Ralph R. Browning, a Director and Vice-President of Union Carbide and Carbon Corporation that this change in corporate structure was done in good faith and pursuant to sound business practices, with no consideration of the pending action.

The defendant Union Carbide and Carbon Corporation has moved to dismiss the information as to the three aforementioned subsidiary defendants on the ground that they are no longer in existence.

It is well settled that the laws of the state of incorporation will govern the effect to be given a merged or dissolved corporation. *Oklahoma National Gas Co. v. State of Oklahoma,* 273 U.S. 257; *United States v. Safeway Stores,* 10 Cir., 140 F. (2d) 834. Therefore, the law of Delaware, West Virginia and New York will govern.

All three states, as well as the vast majority of jurisdictions in this country, state that at common law a dissolved or merged corporation is as if it did not exist and all pending litigation, being either criminal or civil, abates. *Commercial Bank v. Lockwood's Adm'r.,* 2 Har. (Del.) 8; *Miller's Adm'x. v. Newburg Orrel Coal Co.,* 31 W. Va. 836, 8 S.E. 600; *In re National Surety Co.,* 286 N.Y. 216, 36 N.E. (2d) 119. Thus, unless the statutes of the respective states abrogate the common law rule that criminal actions against corporations abate upon dissolution or merger, that rule is still applicable.

The pertinent provisions of the controlling statutes are Sections 261, 278 and 282 of the Delaware Code Annotated; Section 3095 (83) of the West Virginia Code, and Sections 85 and 105 of New York Consolidated Laws. To be sure, these statutes are not literally parallel, but their provisions

for the purposes of this determination are enough alike in their effect so that a complete recital thereof is not warranted. Suffice it to say that the pertinent provisions of the Delaware statute provide for survival of "actions, suits or proceedings" after dissolution, the West Virginia Code provides for "suits to be brought, conducted, prosecuted or defended," and the New York sections apply to "liabilities and obligations."

Neither counsel for the movant nor counsel for the Government has brought to the Court's attention any decision of the respective state courts construing their statutes in regard to the precise point in consideration, nor has any such authority been found. However, in the case of *United States v. Safeway Stores*, supra, The Court of Appeals for the Tenth Circuit interpreted the Delaware statute, among others, and came to the conclusion that "actions, suits or proceedings" under the Delaware code do not encompass criminal actions, and that such would not lie against a corporation which had been priorily dissolved.

This Court is bound by this decision, barring a subsequent and contrary interpretation of the Delaware statute by its own courts. The Government contends that the Delaware court has given this statute a contrary interpretation in *Addy v. Short*, 89 A (2d) 136, and that this Court should follow *United States v. Collier*, 7 Cir., 208 F. (2d) 936, which reached a result contrary to the *Safeway* case, partly on the basis of this Delaware decision. But an examination of the *Addy* case will disclose that it is a civil action in the nature of ejectment to secure the vesting of a possibility of reverter. There is no language therein suggesting an interpretation of the statute in regard to criminal procedure, and, consequently, this Court feels the case to have no bearing on the question presented here, and as decided in *United States v. Safeway Stores*, supra.

The Government advocates that a distinction be drawn between an *ante-litem* dissolution, as in the *Safeway* case,

and a *pendente lite* dissolution as in the case at bar. A good-faith dissolution by merger subsequent to the indictment for Sherman Act violations was presented in *United States v. Line Material*, 6 Cir., 202 F. (2d) 929, and the Court of Appeals in that case reached the same conclusion as was reached in the *Safeway* case (which it cited with approval) in regard to the interpretation of the Delaware statute. The Court is of the opinion that on the basis of that case no real distinction is here presented.

The *Safeway* case is also a negative answer to the Government's contention that the three subsidiary corporations are in reality still in existence for the purposes of this suit. There is no contention that the laws of the states of incorporation were not complied with. It is clear then, by a reading of the *Safeway* case, that a dissolved or merged corporation may be subject to *civil* proceedings under the statutes, but unless the particular statute pertains to criminal actions, it does not follow as a matter of course that the latter actions are preserved and the corporation is still in de facto existence for that purpose. Rather, the common law rule mentioned above prevails in the absence of statutory abrogation.

Inasmuch as this Court is bound by the decision of the Court of Appeals in *United States v. Safeway Stores*, supra, that "suits, actions and proceedings" under the Delaware code do not embrace criminal prosecutions, it is only consistent in adhering to that decision that "suits" under West Virginia Law do not include criminal actions. No West Virginia cases have been cited, nor can any be found giving a contrary interpretation.

As to the New York law, the Government relies heavily upon an opinion by the Federal District Court for the Southern District of New York. *In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian International Paper Company*, 72 F. Supp. 1013. That case indicated that "liabilities or obligations" under Section 216 of the

New York General Corporation Law included fixed liability to the United States of both civil and criminal nature. But there is a clear and valid distinction between statutes providing for procedure following a certificate of surrender to do business within the state, which is involved in the aforementioned Section 216, and procedure following dissolution by merger which is involved here.

Furthermore, it is to be noted that this case is not one in which a court of New York is interpreting its own statutes, but rather a Federal District Court. Therefore, there being no contrary interpretation of the New York statute in question here by its own tribunal, the philosophy of the *Safeway* case speaking of "actions, suits or proceedings" also includes "liabilities and obligations," and is controlling. Therefore, it is

ORDERED AND ADJUDGED that the motion to dismiss the criminal information as to Electro Metallurgical Company, United States Vanadium Corporation, and Electro Metallurgical Sales Corporation, be and the same is hereby granted.

DATED at Denver, Colorado, this seventeenth day of June, A.D. 1955.

WILLIAM LEE KNOUS
William Lee Knous,
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

NOVEMBER TERM, 1955

UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY AND ELECTRO METALLURGICAL SALES CORPORATION,
Appellees.

Number 5211

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Worth Rowley, Attorney, Dept. of Justice, (Charles L. Whittinghill, Marshall C. Gardner, Attorneys, Dept. of Justice, Stanley N. Barnes, Assistant Attorney General, and Donald E. Kelley, United States Attorney, were with him on the brief) for Appellant;

John F. Shafroth and Morrison Shafroth (Erl H. Ellis; Grant, Shafroth and Toll were with them on the brief) for Appellees.

Before HUXMAN, MURRAH and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

The sole question presented for decision is whether three subsidiary corporations against whom criminal proceedings are pending are entitled to have such criminal proceedings abated, when they thereafter are merged with a parent corporation and have surrendered their charter.

The three subsidiaries against whom criminal actions

were pending at the time they were merged with their parent, the Union Carbide and Carbon Corporation, were the Electro Metallurgical Company, a West Virginia corporation, the United States Vanadium Corporation, a Delaware corporation, and the Electro Metallurgical Sales Corporation, a New York corporation. Upon merger with their parent the three subsidiaries were dissolved under the laws of the state of their incorporation. The trial court decided the question in the affirmative and dismissed the criminal proceedings pending against them; the Government has appealed.

There is no conflict in the basic principles of law which must guide us in seeking the correct answer. Thus it is established without exception that at common law, upon dissolution, a corporation ceases to exist for all purposes. It can no more be sued civilly or prosecuted criminally than can a natural person who has died.[1] It is equally well established that such common law status relating to dissolved corporations has been modified and changed by statute in the various states and that under such statutes proceedings and actions as authorized thereby may be maintained against such corporations. Also well settled is the principle that in determining whether upon dissolution the life of a corporation comes to an end for all purposes or whether it remains in a state of suspended animation so to speak for the purposes of the statute, we look to the state law and its construction by the state courts.

No decisions by the courts of Delaware, West Virginia, or New York are cited and our search has failed to reveal any which would definitely and completely answer this question. In United States v. Safeway Stores, Inc., 140 F. 2nd 834, we held that a criminal prosecution brought against a dissolved Delaware corporation did not survive. This conclusion is supported by the Sixth Circuit in United States

[1] See United States v. Safeway Stores, Inc., 140 F.2d 834, and cases there cited.

v. Line Material Company, 202 F. 2d 929. However, in United States v. P. F. Collier and Son Corporation, 208 F. 2d 936, the Seventh Circuit reached a contrary conclusion. In light of these later decisions we are asked to re-examine the *Safeway* case and, in effect, are asked to overrule it. Assuming without deciding that members of this panel of the court are not in full sympathy with the law as declared in the *Safeway* case, for reasons presently stated we nonetheless adhere to the doctrine there announced. We feel that one panel of the court should not lightly overrule a decision by another panel. To do so puts the law into a state of flux, and no one can tell what the law will be until the composition of the court is determined. Since the Circuits are not in agreement as to the law of Delaware and until the Supreme Court has spoken, we adhere to the law as declared in the *Safeway* case, *supra*. Since we have reached this conclusion, nothing of value would be added if we analyzed the decisions of the three Circuits which have construed the Delaware law.

Appellee Electro Metallurgical Company was a West Virginia corporation. The law of West Virginia with respect to dissolved corporations provides with limitations that suits may be brought, conducted, prosecuted or defended, etc., after dissolution.[2] No decisions have been

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[2] Sec. 3095 (1949) provides:
"EFFECT OF DISSOLUTION OR EXPIRATION.
"When a corporation shall expire or be dissolved as prescribed in this article, its property and assets shall be subject to the payment of the corporate obligations and the expenses of winding up its affairs, * * *. The board of directors and the executive officers in office at the date of such expiration or dissolution, * * * may cause suits to be brought, conducted, prosecuted or defended, the real and personal property of the corporation to be conveyed or transferred under the common seal or otherwise, further assurances of previous conveyances to be made, and all lawful acts to be done, in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper to do and perform every act and thing which should have been or should be done and performed by the corporation, and for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting, defending, and protecting its rights, enforcing all claims in its favor, and paying over and distributing its property and assets, or the proceeds thereof, to those entitled thereto."

found interpreting the West Virginia dissolution law. In many aspects it resembles the law of Delaware. We find nothing therein which would require a different conclusion from that with respect to the Delaware law.

With respect to the New York subsidiary a somewhat different picture is presented. While no New York decisions are cited which have specifically passed upon the question, there are certain decisions which point the way. There was also filed with us at the time of oral argument a photostatic copy of an opinion by United States District Judge Weinfeld of the Southern District of New York, in which he held that under New York law a criminal action survived the dissolution of a corporation.[3] In reaching this conclusion he relied upon Section 90 of the New York stock corporation law which provides, "The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof be released or impaired by any such consolidation; * * * and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party * * * shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; * * *." Attention was also called to Section 11-a of the New York General construction law which provides that " 'Action' when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Actions are of two kinds: civil and criminal." From this Judge Weinfeld concluded that the word "action" in Section 90 embraces both civil and criminal proceedings. With this reasoning we agree.

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[3] See United States of America v. Cigarette Merchandisers Association, Inc., et al, opinion filed November 23, 1955.

But aside from statutory construction and consideration, Judge Weinfeld concluded that the clear public policy of New York with respect to dissolved or consolidated corporations included the "right of the community to vindicate any charge against the corporation for crimes it may have committed prior to dissolution."

Appellees seek to distinguish the *Cigarette Merchandisers* case on the ground that it was decided under Section 90 dealing with consolidations, while these cases arose under Section 87 and Section 29 of the New York Code which deal with the merger of corporations. For the decision of the question before us, this in our view is a distinction without a difference. Neither Section 85 nor Section 29 deal with what pending causes of action survive the dissolution of a corporation. Section 29 merely provides that in the event of a dissolution of a corporation for any cause or in any manner its corporate existence shall continue for the purpose of winding up its affairs, and Section 85 provides that when a certificate is filed all the property of the merged corporation vests and is held and enjoyed by the successor corporation subject to all liabilities and obligations of the merged corporation. Subsection 8 of Section 105 provides that such a corporation shall continue for the purpose of satisfying obligations and collecting assets, and that for such purposes it may sue and be sued.

The *Cigarette Merchandisers* case was not decided on the narrow ground that the law declared therein applied only in the case of consolidation and was not intended to cover mergers. In the statement of facts in that case it is stated that the stockholders of the "Rowe" Corporation "voted to *merge*[4] and consolidate," and further on it is stated that under the New York law governing consolidation a merged corporation is continued for purposes of criminal prosecution.

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[4] Emphasis supplied.

There is, of course, a legal and technical distinction between merger and consolidation of two companies, which for some purposes may become important. However, for the purpose of answering the question presented to us, it is in our view immaterial whether there is a merger or consolidation. In the case of a merger the merged corporation is absorbed by the merging company and ceases to exist, while the merging company continues its existence. In the case of a consolidation of two companies, a new entity is created into which both of the consolidated companies are absorbed. In each instance the question is what becomes of criminal prosecutions pending against companies which now no longer exist, either as a result of a merger or of a consolidation.

We see nothing in Section 87 which leads us to conclude that with respect to liability under a pending criminal action the status of a non-existent corporation resulting from a merger is controlled by different principles of law than is the status of such a company when it becomes extinct by consolidation.

Since the decision in the *Cigarette Merchandisers* case is by a federal court, it is of course not binding upon us. We, however, feel that it is a well reasoned case and that it correctly analyzes the New York law. It is our conclusion that under New York law a criminal action pending against a corporation which is merged survives the same as in the case of its consolidation.

In United States v. Electro Metallurgical Company and in United States v. United States Vanadium Corporation the judgments are AFFIRMED. In United States v. Electro Metallurgical Sales Corporation the judgment is REVERSED and the cause is remanded for proceedings in conformity with the views expressed herein.

APPENDIX C

CONSOLIDATED LAWS OF NEW YORK

Stock Corporation Law, Art. 8, Ch. 59, Sec. 85.1, 2, and Sec. 90 (Laws of 1923, Ch. 787, amending generally Laws of 1909, Ch. 61)

General Corporation Law, Art. 2, Ch. 23, Sec. 29 (Laws of 1929, Ch. 650)

Sec. 85. Merger.

1. Any domestic stock corporation or any foreign stock corporation authorized to do business in this state owning at least ninety-five per centum of the outstanding shares of each class of the stock of any other domestic stock corporation, authorized to engage in business similar or incidental to the business which the possessor corporation is authorized to engage in, and any domestic stock corporation owning at least ninety-five per centum of the outstanding shares of each class of the stock of any foreign stock corporation authorized to do business in this state and authorized to engage in business similar or incidental to the business which the possessor corporation is authorized to engage in, may file in the department of state a certificate of such ownership, in its name and under its corporate seal, signed by its president or a vice-president and its secretary or treasurer and setting forth a copy of the resolution of its board of directors to merge such other corporation, and to assume all of its obligations, and the date of the adoption thereof, provided, however, that in case the possessor corporation shall not own all the outstanding stock of the other corporation to be merged, the resolution of the board of directors of the possessor corporation shall state the term and conditions of the merger, including the securities, cash or other consideration to be issued, paid or delivered by the possessor corporation upon surrender of each share of the merged corporation not owned by the possessor corporation, and provided further that prior to the filing of the certificate in the department of state, the possessor corporation shall mail to each stockholder of record of the corporation to be merged a copy of such resolution and notice of adoption thereof, and the certificate shall state that the resolution and notice have been so mailed. Upon the filing of such certificate, all of the estate, property, rights, privileges and franchises of such other corporation, shall vest in and be held and enjoyed by such possessor

corporation as fully and entirely and without change or diminution as the same were before held and enjoyed by such other corporation, and be managed and controlled by such possessor corporation, and, except as provided in subdivision three of this section, in its name, but subject to all liabilities and obligations of such other corporation and the rights of all creditors thereof. The possessor corporation shall not thereby acquire power to engage in any business or to exercise any right, privilege or franchise of a kind which it could not lawfully engage in or exercise under the provisions of the law by or pursuant to which such possessor corporation is organized.

2. The possessor corporation shall be deemed to have assumed all the liabilities and obligations of the merged corporation and shall be liable in the same manner as if it had itself incurred such liabilities and obligations.

Sec. 90. Rights of Creditors of Consolidated Corporations.

The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation due or to become due, or any claim or demand for any cause existing against any such corporation or against any stockholder thereof, be released or impaired by any such consolidation; but such consolidated corporation shall be deemed to have assumed and shall be liable for all liabilities and obligations of each of the corporations consolidated in the same manner as if such consolidated corporation had itself incurred such liabilities or obligations. The stockholders of the respective constituent corporations shall continue subject to all the liabilities, claims and demands existing against them as such, at or before the consolidation; and no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party, or in which any stockholder is a party, shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation had been entered into; or such consolidated

corporation may be substituted as a party in place of any constituent corporation, by order of the court in which such action or proceeding may be pending.

GENERAL CORPORATION LAW
Art. 2, Ch. 23

Sec. 29. Corporate existence to continue in case of dissolution; authority of directors

Upon the dissolution of a corporation for any cause and whether voluntary or involuntary its corporate existence shall continue for the purpose of paying, satisfying and discharging any existing liabilities or obligations, collecting and distributing its assets and doing all other acts required to adjust and wind up its business and affairs, and it may sue and be sued in its corporate name. Unless other persons shall be designated by law or by a court of competent jurisdiction, the directors shall have full power to settle its affairs and to distribute to the persons entitled thereto the assets remaining after the payment of debts and necessary expenses. During the period of adjusting and winding up the business and affairs of such corporation, the directors may, from time to time, elect or appoint officers of the corporation having the powers and duties provided in the by-laws existing at the time of such dissolution, and such other powers and duties as may be conferred upon them by resolution of the directors; and such other agents, employees, accountants and counsel as in the judgment of the directors may be required.